SUPREME COURT, U.S.
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No. 10-521

In The

Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY,

Petitioner,

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH
and UNITED STATES OF AMERICA,

Respondents.

**On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit**

BRIEF OF *AMICUS CURIAE*, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) has a strong interest in this Court clarifying the conflicts among appellate courts in interpreting provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc through 2000cc-(5) (RLUIPA) deciding important questions of federal law that have not been previously settled by this Court but should be.

IMLA is a non-profit professional organization of more than 3,500 local government entities, including cities, counties, and their subdivisions, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since its establishment in 1935, IMLA has grown to become the oldest and largest association of its kind and an international clearinghouse of legal information and cooperation on municipal legal matters.

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[1] Pursuant to Rule 37.3 of the Rules of the United States Supreme Court (2010) (subsequently referred to herein as the "Rules"), counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

Pursuant to Rule 37.6 of the Rules of this Court, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

IMLA submits this brief to assist the Court in determining whether to grant certiorari to hear this case. This *amicus* brief provides the Court with an understanding of the challenges faced by municipalities in reasonably addressing or adhering to the provisions of RLUIPA §§ 2000cc(b)(1) and (b)(3)(B), while simultaneously carrying out their duties to implement land use regulations necessary for the health, safety and welfare of their communities. It sets forth information about the importance of restoring the balance between an appropriate accommodation of religious interests and traditional deference to local government decision-making on land use issues. It also explains the importance to IMLA's members of this Court's recognition that local governments should not be required to approve applications from religious institutions that do not meet local government standards in the absence of anti-religious discrimination.

SUMMARY OF ARGUMENT

Boulder County denied the majority of the Rocky Mountain Christian Church's ("Church" or "RMCC") 2004 expansion proposal because it violated long-established community plans that protected the rural environment. Evidence at trial further demonstrated that any similar application, secular or religious, would have been rejected by Boulder County during the time period at issue.

Although RMCC was not permitted to double the size of its campus, it continued to provide religious services without interference, together with numerous other religious institutions located in all but one County zoning district.

RLUIPA was adopted as remedial legislation to address discrimination based on religion against institutionalized persons and in zoning and other land use decisions. As the petitioner notes, this Court has not established guidelines for interpreting RLUIPA, nor has it addressed the constitutionality of RLUIPA's land use provisions. It is imperative that the Court provide much needed clarity to local government officials and staff on these aspects of RLUIPA.

The Equal Terms test adopted by the Tenth Circuit gives courts virtually unlimited power to overrule neutral unbiased land use decisions involving religious applicants. The Equal Terms provision in Section 2(b)(1) of RLUIPA was intended to prevent public agencies from treating religious land uses less favorably than similarly situated secular uses. Since prior to *Euclid v. Ambler*, 272 U.S. 365 (1926), courts have deferred to local legislative classifications in determining whether uses are similarly situated, in recognition of the specialized nature of local planning decisions. The Tenth Circuit's decision allows courts or juries to substitute their own judgment on local planning classifications for that of elected officials supported by staff, even in the absence of any showing of anti-religious bias.

The Unreasonable Limitations test adopted by the Tenth Circuit forces local agencies to base land use decisions on the religious interests of applicants rather than the general public welfare. The Unreasonable Limitations provision in Section 2(b)(2) of RLUIPA was intended to prevent public agencies from enacting land use laws that exclude or unnecessarily limit the operations of religious institutions within a jurisdiction. Again, courts give local elected officials wide discretion in determining whether a land use decision is reasonable, provided that it is related to the public interest and supported by substantial evidence. The Tenth Circuit's decision turns the typical rule on its head, by focusing on whether the church's desire to expand its facilities is reasonable, without regard to the reasonableness of the County's regulatory concerns.

RLUIPA is unworkable as a practical matter and arguably unconstitutional if it requires local agencies to favor specific applications solely because they are submitted by a religious organization. Unless there is evidence of discrimination, RLUIPA should be interpreted consistently with its remedial purpose to incorporate both existing First Amendment jurisprudence and traditional deference to legislative decision-making. The Tenth Circuit's decision to the contrary interferes impermissibly with Boulder County's traditional police power authority over land use and development.

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REASONS FOR GRANTING THE PETITION

I. The Interpretation Of RLUIPA Adopted By The Tenth Circuit Fails To Give Adequate Guidance To Local Agencies Who May Violate RLUIPA Unintentionally And Without Any Discriminatory Intent

The Tenth Circuit's interpretation of RLUIPA requires local governments to provide special rights to religious uses. It undermines the traditional power of local governments to plan for growth and regulate land within their jurisdictions. It hamstrings local governments' ability to implement reasonable and unbiased regulation for all. Yet, unlike other circuits, the Tenth Circuit provides no guidance to local agencies on how to comply with RLUIPA's requirements.

Since RLUIPA was adopted, local governments across the country have found it increasingly difficult to apply reasonable and non-discriminatory land use regulations to religious properties, due to threats of costly and divisive RLUIPA litigation. *See Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*[2] at 806. Yet, the public interest requires elected officials to consider the impacts of all proposed development on issues of

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[2] Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 Seattle University Law Review 805, 806 (citations omitted).

legitimate local concern, such as compatibility, traffic, aesthetics and environmental protection. *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003); *see also Clark v. Boscher*, 514 F.3d 107, 113 (1st Cir. 2008). The secondary effects of religious uses are no less serious than those of secular developments, and RLUIPA should not be interpreted to immunize religious entities from normal land use regulation.

Congress intended the entirety of RLUIPA, but especially Section 2, to remedy overt or covert discrimination against religious land uses, with special emphasis on the protections of minority or non-mainstream religions. *See* H.R. Rep. No. 106-219, 18-24 (1999); 146 Cong. Rec. 16698 (2000) (Joint Statement of Senators Hatch and Kennedy; *see also* RLUIPA READER at 31-39.[3] Legislative history demonstrates two complementary goals: (1) to eliminate intentional discrimination but (2) not to immunize religious entities from local land use regulation. Lennington at 816. To the extent RLUIPA is remedial, it was intended to remedy discrimination "based on religion in denials of zoning approval..." U.S. Department of Justice, *Report on the Tenth Anniversary of RLUIPA* at 3.[4] RLUIPA is given an effect that was never intended by Congress

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[3] RLUIPA READER: Religious Land Uses, Zoning, and the Courts (Michael S. Giamo & Lora A. Lucero eds., American Bar Ass'n, 2009)

[4] U.S. Department of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act* (Sept. 22, 2010), www.justice.gov/crt/rluipa_report_092210.pdf

when local governments like Boulder County are required to unconditionally approve land use applications that would otherwise be denied, simply because they are submitted by religious entities.

The gravamen of a RLUIPA violation, therefore, should be evidence that the local agency based its land use decision, wholly or in part, on the religious nature of a proposed use or the religious identity of the applicant. The Tenth Circuit decision affirmatively injects religion into the local land use process, even where the local agency did not consider it as a contributing factor. Without proof of discrimination against religion, there should be no RLUIPA violation.

Boulder County's partial denial of the Church's application was based on its size and design failing to meet applicable Special Use Permit criteria. Prior to 2004, RMCC received permits for a 113,200 square foot worship and school complex with 380 students, making it the largest church in the County. Court of Appeals Appellant's Appendix ("A.") at 3411:7-12; 6461-62; 4809-10; 4076:11-20. In its challenged 2004 decision, the County approved expansion of the existing sanctuary by 150 seats and construction of 10,000 square feet to replace temporary classrooms installed two years earlier. A. 5102-04; 5043:4-5. Boulder County rejected those portions of the Church's application that proposed a large gymnasium and sizable school expansion, together with a small chapel and gallery space. *Id.*

The County found that the proposed Church expansion was incompatible with surrounding

development, would cause undue traffic congestion, was inadequately buffered and would cover too much of the site with paving. *See* A. 4092:1-12; 5101-03; 5578-84. All of these are legitimate grounds for denial of a development application as part of a public welfare determination anywhere in the country. *See Agins v. Tiburon*, 477 U.S. 255, 261 (1980); *Nollan v. California Coastal Com'n*, 483 U.S. 825, 834-35 (1987). Land use regulations present some level of inconvenience and difficulty for any applicant, Lennington at 818, but any building of similar size would have been subject to the same review process and land use standards in Boulder County. A. 4016-17.

The Tenth Circuit's decision displays a fundamental lack of understanding of local land use practice. Land use regulation involves changes over time to address new and emerging concerns, such as the increasingly rapid loss of agricultural lands and open space. It involves all members of the community, with many competing interests. The appropriate implementation of RLUIPA must balance the religious institutions' development schemes with the health, safety and welfare of this larger community. Colorado Local Government Land Use Control Enabling Act, COLO. REV. STAT. §§ 29-20-101 *et seq.* (West 2010); Colorado County Planning Code, COLO. REV. STAT. §§ 30-28-101 *et seq.* (West 2008).

II. The "Equal Terms" Test Adopted By The Tenth Circuit Gives Courts Virtually Unlimited Power To Overrule Legitimate Non-Discriminatory Local Land Use Decisions.

RLUIPA requires that governments not treat a religious assembly or institution on less equal terms than a non-religious assembly or institution. According to the Tenth Circuit, the Church was required to prove "that [the County] treated [RMCC] less favorably in processing, determining, and deciding the 2004 special use application of the [RMCC] than [the County] treated a similarly situated nonreligious assembly or institution." Appendix to Petition for Writ of Certiorari ("Pet. App.") 11.

A critical question under the Equal Terms provision is whether the religious and secular uses are "similarly situated" for the purposes of RLUIPA analysis. However, determining on-the-ground similarity requires consideration of a wide range of issues, including design, size, topography, intensity of use, neighborhood character, and the manner in which local land use regulations have been interpreted and applied on an ongoing basis. Every zoning decision is quintessentially local, reflecting public policy concerns about the impact of the use. *Nichols v. Bd. of County*, 506 F.3d 962, 971 (10th Cir. 2007); RLUIPA READER, *supra* at 45. As recognized by Justice Kennedy, "zoning regulations have a *prima facie* legitimate purpose: to limit the negative externalities of land use." *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 449 (2002)

(Kennedy, J., concurring). Before approving a development, therefore, local governments must decide that its public benefits outweigh its negative secondary effects.

As noted above, Boulder County concluded that the requested Church expansion would have significant negative effects on the surrounding community, including its rural character, due to traffic, scale, buffering, visibility and site coverage. The County demonstrated that the private school used as a comparator differed significantly from RMCC with respect to each of these public policy grounds. For instance, the RMCC project would have generated five times as much traffic as the school A. 4710-11, resulting in significantly greater negative externalities and putting the two uses into entirely different categories for land use planning purposes. The fact that both projects were large, or that both included a gymnasium, did not mean that they had the same secondary impacts.

Courts uniformly give wide discretion to local legislative judgments about the existence and relative importance of specific planning factors and their negative impacts. Zoning classifications in particular are judged by the highly deferential rational relationship test when determining whether two uses are "similarly situated" for the purpose of an equal protection claim. *Norton v. Vill. of Corrales*, 103 F.3d 928, 933 (10th Cir. 1996) (federal courts do not sit as a zoning board of appeals to resolve municipal zoning disputes). So long as the classifications are fairly debatable, rational, or legitimate, courts do not interfere with local land use

decisions. *Messiah Baptist Ch. v. Cty., Jefferson, Colo.*, 859 F.2d 820, 823 (10th Cir. 1988).

The Tenth Circuit's interpretation of the Equal Terms provision effectively eliminates the rational basis test whenever a religious use is affected, regardless of the agency's neutrality toward religion. Instead of deferring to local legislative judgment on the relative importance of planning factors, the court below allowed a jury to pick and choose among the factors. The court did not even require a showing that the Church and school were "similarly situated" with respect to factors that were important under the County's planning system, such as traffic and buffering. *See, e.g. River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 380 (7th Cir. 2010).

The Tenth Circuit neither deferred to Boulder County's judgment, nor established any rules for determining when two uses are substantially similar under RLUIPA. There was no way for the County to predict that a jury would decide nearly ten years after-the-fact that the similar size of the RMCC and Dawson School projects was more important than their traffic or visual impacts, especially since these types of land use decisions are historically entrusted to local elected officials. This is the type of unwarranted, and unintended, interference with the normal functioning of an administrative system warned of by this Court in the prison context under RLUIPA. *Cutter v. Wilkinson*, 544 U.S. 709, 710-711 (2005).

The Tenth Circuit's decision also threatens the ability of local elected officials to incorporate changed circumstances, updated community standards and new information into the land use process. The nine-year gap between the RMCC and Dawson School decisions was ignored by the court below, yet land use policies and processes typically develop over time:

> In the land-use context, timing is critical and, thus, can supply an important basis for differential treatment. Since zoning bylaws, environmental standards, and licensing criteria may change over time, courts must be sensitive to the possibility that differential treatment-especially differential treatment following a time lag-may indicate a change in policy rather than an intent to discriminate. *See Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002). Consequently, the most reliable comparisons are likely to be from roughly the same time frame.

Cordi-Allen v. Conlon, 494 F.3d 245, 253 (1st Cir. 2007) (*emphasis added*).

In planning terms, a decade is a long time. It ignores planning reality to compare a private school approved by different elected decision makers to a church expansion proposal partially approved nine years later. Absent recognition of this difference, the Tenth Circuit's formulation allows local agencies to

be found liable for "unequal" processing – even when the projects are not similarly situated with respect to the factors adjudged significant by the local decision-makers.

Local governments need the flexibility to adopt new planning policies and requirements. The rational relationship test gives them the breathing room they need to advance the public interest in planned development. Cities and counties need this Court to establish that, in the absence of religious bias, RLUIPA was not intended to substitute the judgment of the courts for that of elected officials entrusted with the future of our communities.

III. The "Unreasonable Limitation" Test Adopted By The Tenth Circuit Forces Local Agencies To Base Land Use Decisions On The Religious Interests Of Applicants Rather Than The General Public Welfare.

RLUIPA prohibits discrimination and exclusion in land use decisions by requiring that governments not totally exclude or unreasonably limit religious assemblies, institutions, or structures within a jurisdiction. The Tenth Circuit found that the Church was required to prove that the County's "regulation, as applied or implemented, has the effect of depriving both [RMCC] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County." Pet. App. 15. Neither the district court nor the Tenth Circuit elaborated on a standard for what constitutes an "unreasonable limitation." Nor did

they define what might constitute the converse, a "reasonable opportunity."

Boulder County allowed churches in all but one of its zoning districts. A. 6916. It approved all of the conditional use permits submitted by religious entities, including all of RMCC's applications until 2004. A. 4099:8-21. The Church was allowed to expand in phases to its current size of 113,200 square feet, with a 380-student school. A. 3403:3-6-6. Boulder County's Code permitted churches in zoning districts where many large uses, such as warehouses and retail stores, are prohibited. A. 5041:16-21; 6842-45. The Code also allowed small neighborhood churches without special review. A. 3995-96.

While it may be reasonable for a religious institution to desire to construct a mega-church, it is not conversely unreasonable for a local government to prohibit a church located in a rural agricultural zone outside the urban area from doubling in size. The County's land use regulations were also reasonable, with goals of preserving the rural environment, implementing long-range plans and limiting secondary effects of development. *Alameda Books*, 535 U.S. at 450. Therefore, it appears that the court below judged the "reasonableness" of the opportunity or limitation solely on the desire of the religious institution to construct a mega-church, and not from the perspective of the community as a whole.

The Tenth Circuit decision shows the dilemma posed for local governments by this formulation. It

may have been eminently reasonable for Boulder County to limit the size of structures in agricultural zones in accordance with long-established community plans. Failure to incorporate traffic and development restrictions in agricultural zones would undermine both the internal consistency and ultimate success of the community plan. In some states, internal inconsistency is enough to invalidate a comprehensive plan so that Boulder County's regulations were not only reasonable, they may have been legally necessary. *See*, e.g., CAL. GOV'T CODE § 65300.5 (West 2010).

Even if RMCC's desire to double its membership was a reasonable organizational goal, it does not follow that it was reasonable for the public to allow a mega-structure on its existing site. RLUIPA prevents local governments and courts from inquiring into whether the Church's construction plans are compelled by or central to religious exercise, Sec. 8.(7)(A), but it does not define "reasonable." The Tenth Circuit decision puts the local agency in the untenable position of having to decide whether a religious entity's plans are internally reasonable and, then, whether it is reasonable for the church to implement them at the proposed scale on the proposed site.

The evidence cited by the Tenth Circuit in support of its "Unreasonable Limitation" analysis highlights the conceptual problems. The fact that other large assembly sites were scarce in unincorporated areas is not an unreasonable limit if the regulations were based on sound planning. The fact that other religious institutions reportedly ran

out of money or modified some applications to gain County approval is not evidence of unreasonable limits, but normal processing. The anecdotal evidence relied on by the Tenth Circuit actually shows that RMCC was subject to the same increasing strict limits and procedures as any other land use applicant.

According to the Department of Justice, "Congress enacted [the Unreasonable Limitation] provision to address the problem of zoning codes, either facially or in application, excluding places of worship where secular assemblies are permitted." *Statement on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act*, Answer 12.[5] If Congress intended this provision as remedial, the Tenth Circuit decision entirely missed the mark. Boulder County did not enact its agricultural zoning to exclude religious uses while permitting other large assemblies in the same district. Yet, by requiring Boulder County to grant RMCC's application, the Tenth Circuit went far beyond simply removing an assertedly unreasonable limitation. It unnecessarily and improperly exempted RMCC from a whole range of local regulations, and ordered issuance of a permit, solely because of the religious character of the applicant.

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[5] U.S. Department of Justice, *Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Person Act* (RLUIPA) (2010), www.justice.gov/crt/housing/documents/rluipa_q_a9-22-10.pdf

IMLA believes that the Equal Terms and Unreasonable Limitation provisions of RLUIPA can be interpreted consistently with this Court's Free Exercise Clause jurisprudence. However, as applied by the Tenth Circuit, RLUIPA does not simply remedy discrimination against religion, it requires local agencies to consider religion as a positive factor in their land use decisions. If this interpretation is upheld, it raises the same constitutional concerns identified by this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

CONCLUSION

For the foregoing reasons, IMLA respectfully requests that this Court grant the Petitioner's request for a writ of certiorari.

Respectfully submitted,

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